



The Bar Council

## **Bar Council response to the Home Office consultation on The New Plan for Immigration**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office consultation paper on The New Plan for Immigration.<sup>1</sup>

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

4. The Bar Council provides the following response to the Consultation on the New Plan for Immigration (NPI). As will be seen, it has not been able to provide as full a response as would be desirable, given the scope and breadth of the changes that are proposed. In that context, the Bar Council considers that the time allowed for

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<sup>1</sup> <https://www.gov.uk/government/consultations/new-plan-for-immigration>

responses has been seriously inadequate. This rushed process is taking place against a background of proposals that are, in many cases, inadequately formulated, articulated and/or evidenced. We note that many other bodies have made the same point, expressing serious concerns as to the adequacy and fairness of the consultation process.

5. In the Bar Council's view, if and when the proposals advanced in the NPI have reached a stage at which they are sufficiently clear and precise for reasoned consideration to be given to them, it will be vital that all relevant respondees are afforded appropriate time in which to do so. These are not matters which can in any way be considered to be so urgent as to justify an "emergency" approach to legislation.

6. The Bar Council has chosen to limit its response to the issues raised in Chapter 5, these being of the most direct and immediate relevance and concern to its members. The lack of a response to a particular proposal in any part of the NPI (including Chapter 5 itself) must not be taken as support by the Bar Council for the proposal in question.

#### *Question 29:*

*The Government propose an amended 'one-stop process' for all protection claimants. This means supporting individuals to present all protection-related issues at the start of the process. The objective of this process is to avoid sequential and last-minute claims being made, resulting in quicker and more effective decision making for claimants.*

*Are there other measures not set out in the proposals for a 'one-stop process' that the Government could take to speed up the immigration and asylum appeals process, while upholding access to justice? Please give data (where applicable) and detailed reasons.*

#### **Pre-existing measures**

7. The proposals for a “new ‘one-stop’” process lack detail and, at least in part, appear to replicate provisions which are already well established in domestic immigration law. In particular:

- a “one-stop” mechanism is already provided by s.120 of the Nationality, Immigration and Asylum Act 2002 (see also section 96);
- Section 85(5) of the 2002 Act prevents the Tribunal from considering a “new matter”, as defined, on appeal without the consent of the Secretary of State;
- Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 instructs a deciding authority to take account of, as (potentially; see *JT (Cameroon) v SSHD* [2008] EWCA Civ 878) damaging to an applicant’s credibility, behaviour which it believes is designed or likely to conceal information, mislead, or obstruct or delay the resolution of the claim. Such behaviour includes failing to seek asylum before being notified of an immigration decision or before being arrested.

8. Further, there is a power to certify asylum claims as clearly unfounded under s.94 of the 2002 Act (thereby precluding an in-country appeal), and repeat claims will be rejected without a right of appeal unless the new evidence is significantly different from that previously considered and creates a realistic prospect of success on appeal (paragraph 353 of HC395).

### **Modern slavery referrals**

9. As the proposals are presented, the most significant innovation appears to be the inclusion of “referral as a potential victim of modern slavery” within the matters an applicant is required to raise on the one-stop notice. There is a lack of detail as to how this will factor into the status determination process, but potential difficulties clearly arise.

10. Whilst referral of a person into the National Referral Mechanism as a potential victim of modern slavery may impact on that person’s immigration position, it is not

in itself an application for any form of immigration status, and recognition as a victim of modern slavery carries with it no automatic right to a grant of status.

11. Moreover, recognition of a person as a victim of modern slavery does not require that they identify as such, there are reasons potential victims may be reluctant to come forward with information, and they may not recognise themselves as having been trafficked or enslaved. The Home Office's own guidance recognises this; see, for example, *Modern Slavery: Statutory Guidance for England and Wales*, version 2.1, March 2021, at section 3.5 and Annex D, sections 13.10 and 13.11). Penalising potential victims of modern slavery for failing to raise this in terms at the earliest opportunity, as the NPI appears to propose, is inconsistent with this approach, and with the broader purposes of the measures which exist in the United Kingdom to identify and support victims of modern slavery, safeguard individuals and bring perpetrators to justice.

12. It is recognised that the facts underpinning an asylum or human rights claim and a referral into the NRM may overlap, and there may be a case for a right of appeal against NRM decisions. However, any proposals must be in full compliance with the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and Article 4 ECHR. The Bar Council will respond as appropriate to any future consultation addressing these matters in greater detail.

### **Other measures**

13. There are other measures not set out in the proposals for a 'one-stop process' that the Government could take to speed up the immigration and asylum appeals process, while upholding access to justice. They include, but are not limited to the following factors (see also the response from the Immigration Law Practitioners' Association to Chapter 5 at paragraph 83):

- Improved Home Office decision-making. Figures cited in Chapter 1 of the NPI suggest a success rate on appeal of at least 43%. The implications on resources

and the obvious delays which result from this very high proportion of wrongly decided claims having to be addressed on appeal are self-evident.

- Interviewing applicants and making (sustainable) decisions promptly. This cannot be done without sufficient staffing, resources and training.
- Ensuring that the First-tier and Upper Tribunals are sufficiently resourced, in terms of judiciary and courtrooms, to hear appeals without undue delay.
- Ensuring that legal aid providers are properly remunerated so they can continue to operate and that high quality legal advice is available to asylum seekers across the United Kingdom at critical points in the application, appeal and removals process.

14. In outline, the Bar Council's view is that, insofar as the proposals replicate existing measures they are self-evidently otiose. Insofar as it is proposed to introduce a one-stop process that is significantly more restrictive than the existing regime seen as a whole, the case for this has not been demonstrated. Improvements to the efficiency of the system can be made by improving the quality of initial decision making, ensuring the Tribunal has sufficient resources to process appeals efficiently, and ensuring access to high quality legal advice.

### *Question 30*

*Please use the space below to give further feedback on the proposals in chapter 5. In particular, the Government is keen to understand:*

*(a) If there are any ways in which these proposals could be improved to make sure the asylum and appeals system is faster, fairer, and concludes cases more effectively;*

*(b) Whether there are any potential challenges that you can foresee in the approach the Government are taking around streamlining appeals.*

15. The points arising in Chapter 5 are addressed below by reference to the list of issues set out in Question 27, with a separate section for the good faith issues raised in Question 28. In addressing these issues we stress at the outset that, in our view, the case for the sort of radical “overhaul” of the United Kingdom’s asylum system that is proposed in the NPI is simply not made out on the evidence. In particular, the NPI fails to make good its fundamental premise that misuse of the system – “frustrat[ing] removals through sequential or unmeritorious claims, appeals or legal action”, for example – represents a significant problem, let alone that any problems arising justify the sort of radical restrictions that are proposed to the substantive and procedural rights of those vulnerable individuals who are legitimately claiming the protection to which they are entitled in law. As such, nothing that follows should be taken as agreeing the premise of the questions which are asked (i.e., that the proposed “overhaul” is warranted).

**Providing more generous access to advice, including legal advice, to support people to raise issues, provide evidence as early as possible and avoid last minute claims.**

16. The Bar Council strongly supports improved access to expert legal advice for asylum seekers and others facing removal from the United Kingdom, from appropriately trained, regulated and remunerated practitioners. Cuts to legal aid have the effect of limiting access to advice. Ensuring that legal aid providers are properly remunerated so they can continue to operate and that high quality legal advice is available to asylum seekers across the United Kingdom at critical points in the application, appeal and removal process is critical to ensuring fairness and to the efficient running of the system. As the Immigration Law Practitioners’ Association point out (Chapter 5 response at paragraph 79), lack of legal advice and poor-quality legal advice are drivers of repeat claims.

17. The reference to advice “including legal advice” suggests that the proposals may extend to advice other than legal advice. In the absence of any detail we cannot comment on this.

18. Similarly, the NPI refers to a “new legal advice offer” which will “support people to bring their claims in one go, when they are notified about removal action,

rather than bringing late claims shortly before scheduled removal or sequentially over an extended period of time.” If this is intended to suggest that advisors are currently acting in bad faith by encouraging abuse of the system, we note that no evidence is identified to support such an assertion. In the absence of any detail, we cannot comment on the proposal for a “new legal advice offer.”

**Introducing an expedited process for claims and appeals made from detention, providing access to justice while quickly disposing any unmeritorious claims.**

19. The proposals on these issues in the NPI are particularly confused. The formulation above is used in the bullet point summary of proposals, but the substantive discussion that follows is under the heading *Expedited Appeals*, and refers only to an “accelerated appeal process” for individuals in detention, saying nothing about an “expedited process for claims”.

20. In the absence of any detail at all about the proposal for expedited claims, there is little that can be said about it, save to note that the risks of unfairness and unlawfulness in such a system are amply demonstrated by Ouseley J’s analysis in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin). The Bar Council will carefully consider any future proposals for an accelerated claims procedure for those in detention.

21. The proposals in relation to expedited appeals from detention are set out in only the most skeletal form. Again, in the absence of any detail or justification, we refrain from commenting on the substance of these proposals, save to note that any appeal process must guard against the sort of unfairness that was found by the Court of Appeal to inhere in the accelerated appeals process that existed in the context of the now abandoned Detained Fast Track: see *The Lord Chancellor v Detention Action* [2015] WLR 5341.

22. In this regard, the Bar Council also notes the material cited from the 2019 Tribunal Procedure Committee report at paragraph 132 of ILPA’s Chapter 5 response,

the contents of which starkly illuminate the practical difficulties posed by a detained fast track appeals process.

**Providing a quicker process for Judges to take decisions on claims which the Home Office refuse without the right of appeal, reducing delays and costs from judicial reviews.**

23. No detail is given about this proposal. It is assumed that it relates to challenges to decisions underpinning the lack of an appeal right, or an in-country appeal right, such as a decision that the fresh claim rule in paragraph 353 of HC395 is not satisfied, or certification under s.94 or s.96 of the 2002 Act. Such decisions are currently amenable to challenge by way of judicial review.

24. It is not clear whether what is proposed is a new, alternative procedure, or “quicker processes” for the resolution of judicial review claims. In the absence of clear proposals we cannot comment further. We note, however, that there is already a short limitation period for judicial review claims, and that the speed with which the Upper Tribunal or the Administrative Court can process claims that are brought is, to a significant degree, influenced by the level of resources available to the Court or Tribunal.

**Introducing a new system for creating a panel of pre-approved experts (e.g. medical experts) who report to the court or require experts to be jointly agreed by parties.**

25. No evidence is advanced to support the proposals that are made in relation to expert witnesses or to demonstrate that there is any substance to the premise on which they are based. They are in any event unprincipled and deeply inimical to a fair appeals process. As ILPA observe in their Chapter 5 response at paragraph 142, “State interference with, or control over, the witnesses that are permitted to give evidence in cases against the State is a striking and highly problematic proposal, to say the least.” The Bar Council agrees.



26. In litigation before the Tribunal, it is the duty of an expert to help the Tribunal on matters within their expertise. Experts must confirm their compliance with this duty, which is “paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid” (see, inter alia, *Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, section 10).

27. No evidence is provided to support the suggestion that “a very small number of medical and other experts act in a high proportion of cases where expert witness evidence is provided to the court,” or that any legitimate concerns exist as to the independence of experts who provide evidence in this jurisdiction.

28. Expert evidence before the Tribunal emanates from a wide range of sources including clinicians in a range of disciplines, many with particular training and experience in trauma and the documentation of torture (psychiatrists, psychologists, general practitioners, clinicians with expertise on the physical manifestation of torture injuries). Expert evidence is also seen from a wide range of country experts with backgrounds in academia, journalism, development and elsewhere. It is very rare for the Home Office to instruct medical experts, and it tends to rely on its in-house research for country information. The range of factual issues to which expert evidence may be directed is very broad. Curtailing the range of experts which an appellant can instruct has the potential to severely impede their ability to marshal all evidence of relevance to their claim.

29. An expert’s independence and, indeed, expertise can be challenged in the course of proceedings, and it is for the independent judge to make findings as necessary on these matters, as well as the probity of the evidence given, and the weight to which it is entitled in the determination of the issues arising in the appeal that is under consideration.

30. The suggestion that a party seeking to vindicate their factual case in an appeal against a Home Office decision before an independent judge could be constrained to instruct a “pre-approved” expert fundamentally undermines the right to a fair hearing. Proposals for experts to be jointly agreed are, in this context, no better. The

state should not be able to veto or limit the expert evidence an appellant can rely on to challenge the state's decision.

31. A respondent to an appeal raising disputed issues of fact is free to challenge whatever evidence is brought in support of the appeal and, if so advised, to bring its own evidence (expert or otherwise), but it should have no control over the evidence an appellant can bring to support their appeal.

### **Expanding the fixed recoverable costs regime to cover immigration judicial reviews (JRs) and encouraging the increased use of wasted costs orders in Asylum and Immigration matters.**

#### *(a) Expanding fixed recoverable costs to cover immigration judicial reviews*

32. The brief treatment of this topic in the NPI does not support the proposal that is advanced. It is in any event wrong in principle. ILPA have prepared a detailed treatment of this issue in their response to Chapter 5 with which the Bar Council substantially agrees. The variability of the issues arising and the importance of the issues at stake weigh strongly against the proposals made, and there is no evidence base to support them.

33. The Bar Council notes and agrees ILPA's observations at paragraphs 152 and 153 that the complexity of immigration judicial review claims can vary markedly. Some cases turn on narrow and straightforward evidential and legal points. Others turn on immensely complex points of law and/or issues of factual analysis. The documentation that falls to be considered in immigration judicial review claims can vary enormously. In these circumstances, the case for a "one size fits all" fixed costs regime cannot be made good. Costs recovery is ordinarily limited to costs that were reasonably incurred. That is sufficient protection against unreasonable levels of costs being recovered.

34. ILPA are also right to note the observations of the Court of Appeal in *ZN (Afghanistan) & anor v SSHD* [2018] EWCA Civ 1059 at [87] approving the comments of Hayden J in *Sino v SSHD* [2016] EWHC 803 (Admin) at [28] in the following terms:

The appellate courts have expressed concern at the prospect that those lawyers who practise in publicly funded work, often taking on challenging points on behalf of individuals to whom neither the profession nor the public would be instinctively sympathetic, might not be able to recover remuneration at inter partes rates in cases where they were essentially successful. The real risk is that publicly funded practises would soon be unsustainable and access to justice compromised more widely. In my judgement, this is a factor which can and ought properly to be taken into account. It is not a subversion of the principles of the CPR, rather it is a reassertion of the principles in 44.2 (2), ultimately therefore a restatement of a workable costs regime. The minute calibration of success and loss, the pursuit of some platonic concept of 'perfect justice' ... can generate a battle that litigants can only lose.

35. The importance of these comments is apparent a fortiori in the context of the NPI's stated aim of ensuring more generous access to legal advice. Any step that puts further financial pressure on practitioners working in this area will necessarily undermine that objective.

36. Further, as ILPA note, the basis for the assertion that the Home Office is "*rarely able to recover costs*" is unexplained. If this is intended to reflect the fact that, in cases where a costs award is made in favour of the Home Office, it will be unable to enforce the award where the Claimant is legally aided or has no money, then the position of the Home Office is no different to that of any other party (public body or individual) litigating in such circumstances.

37. Finally, it should be remembered that, as a matter of generality, costs are only awarded against a party in litigation where that party is unsuccessful. In this regard, it might be observed that exposure to the risk of costs awards provides a necessary incentive for the Home Office to improve the quality of its decision making.

38. The need for the proposed change to the costs regime for immigration judicial reviews has not been demonstrated and the Bar Council opposes the change.

*(b) Encouraging the increased use of wasted costs orders in asylum and immigration matters*

39. The case for increased use of wasted costs orders (WCOs) in asylum and immigration matters is not made out by the NPI.

40. As with other proposals in the NPI, these proposals lack clarity and are without evidential foundation. In the Bar Council's view it would be extraordinary to target representatives in a particular jurisdiction with a wasted costs regime that is fundamentally different to and more severe than that which operates in other jurisdictions. Insofar as any detail of the proposals is provided, the proposal appears to be to extend the current wasted costs jurisdiction in two (linked) ways:

- a) First, by creating a duty to consider a WCO in the face of certain specified events; and
- b) Second, by creating a presumption that a WCO will be made (presumably, in the face of the same specified events, although that is not said in terms).

41. The specified events appear to include, but not be limited to, (i) *any* breach of directions, however minor and whether or not material to the progress of the appeal, and (ii) "promoting" a case that was – presumably in the view of the judge after the fact – "bound to fail."

42. The Bar Council again notes and substantially agrees with ILPA's analysis of these issues. We make the following points in particular:

- i. The case for a significantly modified wasted costs regime to regulate the conduct of advisors before the Tribunals is simply not made good on the evidence. The nature and extent of the mischief the proposal seeks to address

is not demonstrated. Ample safeguards exist in the form of the regulatory requirements under which advisors operate, the existing wasted costs regime, and the *Hamid* jurisdiction (see *R (Hamid) Secretary of State for Home Department* [2012] EWHC 3070 (Admin) and subsequent “*Hamid*” cases).

- ii. There is obvious unfairness in imposing a significantly more severe wasted costs regime in one jurisdiction than in any other, signalling a wholly unwarranted mistrust in the integrity and conduct of advisors working specifically within that jurisdiction.
- iii. The proposal appears to suggest that the very nature of the wasted costs jurisdiction that is proposed will be more extensive than exists in other jurisdictions, in that the Tribunal will be given the power to order payment of court costs as well as the other party’s costs. That disparity, again, would create obvious unfairness.
- iv. The proposals will have an obviously chilling effect on advisors working in this area, who are already under great financial pressure. As well as the broader fairness issues identified above, this also runs directly counter to the stated purpose in the NPI of improving access to legal advice.
- v. Even if, which is not apparent, the proposals are intended to apply equally to Home Office representatives, the reality is that this will create an imbalance of risk where any order against a Home Office representative will be payable by the Home Office, whereas a WCO order made against a small firm of solicitors or an individual barrister will be paid directly by that company or individual. This imbalance further increases the unfairness that would flow from such proposals.

**Introducing a new fast-track appeal process. This will be for cases that are deemed to be manifestly unfounded or new claims, made late. This will include late referrals for modern slavery insofar as they prevent removal or deportation.**

43. As with the proposals for accelerated appeals from detention, the treatment of this proposal in the NPI is deeply confused. The bullet-point summary refers to “a

new fast-track appeals process”, but the discussion which follows under *Expedited Appeals* focusses not on a “fast track” process as that term might be understood in the context of the fast track processes operated by the Home Office in the past, but on proposals to progress appeals online, narrow issues, and make hearings “shorter and more focussed”. The lack of any real clarity in these proposals precludes a detailed response. The Bar Council will consider future detailed proposals with care and respond as appropriate.

44. As a matter of generality, the Bar Council strongly supports an efficient appeals process, with appeals heard promptly, sufficient time given to parties to properly prepare, and access to legal aid for eligible applicants to ensure appeals are competently presented. We strongly support ensuring that the Tribunal has sufficient resources (both administrative and judicial) to process appeals efficiently and hear them within a reasonable time.

45. No detail is given of the proposals to narrow issues in appeals, or how this will make appeal hearings “shorter and more focussed.” Narrowing issues in an appeal is a sensible objective. However, asylum appeal hearings are already very short when judged against other litigation, civil or criminal, in which significant disputes of fact need to be resolved or complex factual analyses undertaken (as is often, but not always, the case in asylum and other protection appeals).

46. Determination of an asylum appeal may involve factual findings on complex histories, it may involve consideration of detailed expert evidence (medical and other), consideration of (and submissions on) detailed documentary evidence, and submissions on complex points of law. Whilst efficient case management and appropriate narrowing of the issues arising is to be welcomed, curtailing the time available for appeals to be heard risks serious unfairness.

### **Good faith requirement**

47. The NPI fails to make the case for this proposal. Applicants and their representatives are already subject to such obligations.

48. So far as the Bar Council's membership is concerned, barristers are required by their regulatory code to act with honesty and integrity and owe stringent duties to the Court. They are subject to regulatory oversight by the Bar Standards Board.

49. Other than signalling a distrust of legal advisors, imposing a good faith requirement on regulated legal professionals would add nothing to existing regulatory regimes. Doing so in one jurisdiction and not others is particularly objectionable.

50. So far as individual applicants are concerned, a requirement of good faith is inbuilt to the system at every stage. It is a criminal offence to obtain or seek to obtain leave to remain in the United Kingdom by deception (section 24A, Immigration Act 1971). Paragraph 339L(iv) of the Immigration Rules provides that making an asylum claim "at the earliest possible time" bears on the duty to substantiate the basis of claim. As set out in our response to Q29, section 8 of the 2004 Act instructs decision makers to treat behaviour which they believe is intended or likely to conceal information, mislead, or obstruct or delay resolution of a claim as potentially damaging to an applicant's credibility. Entry without leave and remaining beyond the expiry of leave are criminalised by s.24 of the 1971 Act.

#### *Question 45*

*Is there any other feedback on the New Plan for Immigration content that you would like to submit as part of this consultation?*

51. The proposals in the NPI and accompanying consultation are wide ranging. They are of considerable complexity. Many are not yet fully formed. The evidence base for many of the proposals is thin or non-existent, and the purported evidential foundation for many proposals is unparticularised.

52. In the circumstances, the time that has been provided for stakeholders and others to respond is far too short, a profoundly regrettable feature of this process, given the gravity of the issues at stake.

53. As policies and proposals are developed, the Bar Council will respond to future consultations as appropriate, mindful of the need to protect the rule of law, ensure access to high quality legal advice, and meet the United Kingdom's obligations in international law to asylum seekers, refugees, victims of modern slavery and those whose human rights are potentially in issue in the cases to which the proposals relate.

**Bar Council<sup>2</sup>**  
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<sup>2</sup> Prepared by the Law Reform Committee